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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AHMED ASHOUR, et al,

Plaintiffs,

v. 19 Civ. 7081 (OTW)

ARIZONA BEVERAGES, USA, LLC, *et al*,

Defendants.

Conference
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New York, N.Y.
December 15, 2021
3:00 p.m.

Before:

HON. ONA T. WANG,

U.S. Magistrate Judge

APPEARANCES

REESE, LLP
Attorneys for Plaintiffs
BY: CARLOS F. RAMIREZ

STEVENS & LEE, PC
Attorneys for Defendants
BY: ROBERT P. DONOVAN
JOHN VISCONI, II

(Case called)

MR. RAMIREZ: Carlos Ramirez for the plaintiffs.

Good afternoon, Judge.

MR. DONOVAN: Good afternoon, your Honor.

Robert Donovan on behalf of the defendants.

MR. VISCONI: Good afternoon, your Honor.

John Visconi for the defendant.

THE COURT: Good afternoon. Same as the last, except this time we have a court reporter. We're not going to have the tech issues we had last time. Please keep your mask on over your nose and mouth. You may remain seated when you're speaking.

Mr. Ramirez, you may, since you're the only one at plaintiff's table, just pull the microphone really close and speak into it.

THE COURT: For Mr. Donovan and Mr. Visconi, just point it when you're going to talk, take a moment to pull it closer so that we can all hear you, and most importantly so our court reporter can hear you.

All right. Let's see. Let's start with old business. Is there anything outstanding in terms of issues that were supposed to have been resolved after the last conference that are still outstanding and where there's still a dispute?

MR. RAMIREZ: I'm not aware of any.

THE COURT: What about you with the defendant's?

MR. DONOVAN: I don't believe so, your Honor.

THE COURT: Great. I was looking at your status letter. I'm going to ask Mr. Ramirez to talk about your plaintiff's agenda items first, not because of any issue other than I think that the defendant's issues might take a little bit longer, so let's see what we can do here.

MR. RAMIREZ: Sure, Judge. As we noted here, we simply received about 10,000 pages of what is electronically stored information, emails, attachments to the emails. And having gone through it now initially, we are concerned that most certainly upwards of 90 percent or so are not only not relevant to the claims or the defenses, but frankly they're just completely non-responsive.

And we did have a meet and confer today with defense counsel and we brought some of our issues with the production to light, and we will be meeting again next Monday to continue the conversation. I mean to the extent, the Court wants me to elaborate more on what we mean, I'm happy to do that. We're just hoping that we can work this out and hopefully the next round will be more to I think what we were expecting to get.

THE COURT: Okay. All right. So the ESI non-responsive documents is not necessarily ripe yet because you're working through the meet and confer process?

MR. RAMIREZ: Yes, Judge. I guess the only thing that we would note is actually two things. We're really trying very

hard to move this matter forward. With respect to the ESI protocol, one was served up over a year ago. It still hasn't been executed by defendants.

And then on the other issue regarding the ESI, we did work for months with defense counsel to come up with terms. Obviously they're in a better position than we are to know what terms will pull up the types of information that are RFP have requested.

And despite that, we did not get the types of things that we thought we would be getting. So to the extent that months and months have gone by and to the extent that we end up spending another couple of months going through this and we're in the same situation, we would respectfully seek for the Court to order some type of ESI deposition where we can have someone that actually knows where stuff is stored, what things are called what, so that we can finally get down to the bottom line and get the discovery that we need to prosecute this case.

THE COURT: That's sort of the extent of the ESI issues?

MR. RAMIREZ: Yes, Judge.

THE COURT: Okay. I will encourage you to meet and confer. Before we leave today, we're going to set a date for another status conference where I'll expect to hear a little bit more about how those discussions went, so that will definitely be on the agenda for the next conference.

I do want to encourage counsel, the parties to work through this. I prefer not to be ordering discovery about discovery, but I've done it before in other cases. I will do it again here if it seems warranted, and that usually ends up taking a lot more time and expense than a meet and confer and providing the information requested.

MR. DONOVAN: Judge, may I just address that?

THE COURT: Yes. We're not orally arguing this, right?

MR. DONOVAN: We're not, but frankly there are statements made that I would like the Court to be aware of.

THE COURT: Okay.

MR. DONOVAN: Number one, I was not aware of their position until last week, and then this morning we spoke and we identified particular emails. There's a lot of them, Judge. I don't want to go into the details that deal with the cost information, that deal with supplier information, that deal with ingredients and such.

And because of the nature of the fact that the parties agreed on the search terms, and out of an abundance of caution, some other emails which were really marketing research emails that -- remember, custodians were agreed upon, your Honor. Out of an abundance of caution, we included those.

And again, I'm happy to go to the meet and confer and explain to plaintiffs' counsel why I think it's within the

scope of a document request. There was no intention at all to belabor the process. That's all, your Honor. Thank you.

THE COURT: I tend to agree I think with where you're going, Mr. Donovan, is that if one is arguing that there was a document dump and there is significant amounts of material that are not relevant and weren't asked for in any of the discovery requests, that's one issue.

And those I tend to take a more lenient view on because I believe that when you're working with search terms that are agreed upon custodians, sometimes you don't know what's going to turn up until you actually do the search. And it may be more cost effective to provide that information rather than to pull things and guess at whether they're potentially they're going to face a motion to compel later.

That's different from there are gaps in the production where particular search terms or custodians you would expect to see, a whole category of documents or certain types of documents are completely missing. That to me is a much more serious issue, because it involves a gap in discovery rather than too much extraneous stuff that you don't care about. I will engage and listen to both parts of that discovery issue.

And if necessary, will order discovery into the discovery, although that's really not my preference, because I do believe that when parties are working together to try to get the information as efficiently as possible, that's always going

to be more efficient than something that the Court orders without having full visibility into the documents. Okay. All right.

So I understand that's likely, potentially going to be an issue going forward. And then I see in ECF 175, plaintiffs you also have schedule for the remainder of the case.

MR. RAMIREZ: Yes, your Honor. It's pretty straight forward. I think that once we have substantial -- there's a substantial completion of the defendants with respect to the request of discovery, we would need about three months to sought of wrap things up.

Obviously, barring any major issues, we think three months is more than enough time, but we need the discovery obviously.

THE COURT: We'll extend dates out if necessary after we talk about the defendant's agenda item. Now I think these all relate to defendants's discovery request; is that right?

MR. DONOVAN: Yes, your Honor.

THE COURT: And that I would find in the unredacted version of ECF 173-3?

MR. DONOVAN: Correct, your Honor.

THE COURT: Okay. Is it fair to say that all of these relate to retainer agreements for certain of the plaintiffs, or is there another category that we need to address also?

MR. DONOVAN: I think that it's a fair

characterization, it's more than just retainer agreements. It deals with the issue of agreement sharing obligations and such, and documents requested from the three plaintiffs.

THE COURT: All right. Have you met and conferred about this? What is plaintiff's position?

MR. DONOVAN: We have met and conferred.

THE COURT: Have or have not?

MR. DONOVAN: Have.

THE COURT: Mr. Ramirez, what's the plaintiff's position.

MR. RAMIREZ: Your Honor, with respect to any type of joint prosecution agreement or any fee sharing agreement, we think it's wholly irrelevant to the issue of class counsel's adequacy. It is something that we've never been asked for before. I've been doing this since 2000 on and off. My partner's been doing it for the same time continuously.

The cases that counsel cites are not cases for the proposition, that they're entitled to, are not cases that dealt with class certification. They were not cases where the plaintiffs were being accused of being incompetent to represent the class.

In fact, the lawyers for the defendants weren't asking for it. It was the judge in connection with the settlement -- because the judge thought that there was a little bit of a shenanigans with the fee sharing that was going on between

counsel as part of a settlement which she had to approve -- the court *sua sponte* requested this for purposes of making sure that the settlement could be approved.

In fact, your Honor, I've applied for class counsel for two decades, not only has my firm never not been appointed, but defendants routinely, if not every single time, concede that we can competently represent the class.

THE COURT: As I understand it, and it's not a knock on your firm, Mr. Ramirez, that's a pretty low bar, right? I've hardly ever seen that in a class cert motion.

MR. RAMIREZ: Nor have I, Judge. And when asked at some point at one of the meet and confers, in fact a meet and confer we had on September 16th, when I asked whether the defendants thought that our firm would not be appointed and said, will the defendants be looking to take our depositions. Let's just say that that was left up in the air. Okay.

So now there's the possibility that the lawyers are going to be deposed now? I mean that's just not -- it's just not ripe.

THE COURT: Right. And there hasn't been a motion for class cert filed yet?

MR. RAMIREZ: Your Honor, we're in no position to do that at this time because of the lack of discovery.

THE COURT: I mean, I'm just wondering why this isn't premature at this time. If there hasn't been a motion for

class cert filed yet, and as I understand it this information if produced would be used to oppose class cert or challenge Mr. Ramirez's firms adequacy as class counsel. I'm just wondering why now? Why is this dispute coming up now?

MR. DONOVAN: Judge, a request was made -- if I could also before I address that. The *In Re Agent Orange* case that we relied upon and quoted says that it agreed with the district court's ruling that in all future class actions, counsel must inform the court of the existence a fee sharing agreement at the time it is formulated. And this is an issue of whether a conflict exists, Judge.

It's not my intention to -- and it's true, that we had this conversation. I don't know about the deposition one way or the other, but it's true. The competency issue is an issue. In fact, the Court is entitled to inquire about competency, now, not later, now.

And we're not on a fishing expedition, Judge. We have a retainer agreement from one of the plaintiffs. My recollection is that it's plaintiff Townes that purports to allocate 25 percent of the fee to C.K. Lee, who's a lawyer who is not even involved in this case. I don't think this is premature. I think I'm entitled to find --

THE COURT: Okay. Was Townes represented by Mr. Lee before? I understand Mr. Lee's firm was in the related case. Either that plaintiff either dismissed or withdrew, but I

didn't think that that had anything to do with the *Ashour* case. I think Mr. Lee's firm was the lowest docket number on, and that these two cases were related, but then I thought that the intervention and related case issues had been resolved.

MR. DONOVAN: The *Kubilius* case, Judge, was dismissed. My recollection is that Ms. Townes was not a party to that case.

THE COURT: Okay.

MR. DONOVAN: Again, the issue is whether it's relevant, Judge, and discoverable. And under *In Re Agent Orange*, it is, and that case says that the Court has to inquire as to that.

I don't know -- if the Court's incline to wait, I understand that. But if, for instance, there is a fee sharing agreement by and between other folks that raises conflicts with the class or with these particular plaintiffs. That's an issue maybe for deposition for one of the plaintiffs, inquire whether they knew about this other fee sharing agreement.

THE COURT: This seems to me to be somewhat premature because I'm not even understanding why there is a conflict, what the potential conflict is.

MR. DONOVAN: Well, Judge, for example, in *In Re Agent Orange*, the terms of the fee sharing agreement was found to be improper, and the Court found --

THE COURT: But this isn't *In Re Agent Orange*. What

is the conflict that you are concerned about here? How is Mr. Ramirez or his firm -- I think you're trying to raise a conflict with Mr. Ramirez's firm, and I'm just not sure how that relates.

MR. DONOVAN: The issue is whether this fee sharing agreement is discoverable or not, and then the issue is --

THE COURT: Discoverable for what purpose?

MR. DONOVAN: To determine whether there's a conflict between the attorney and the class they seek to represent. I don't know one way or the other whether there is one, because I don't have the fee sharing agreement. All I know is that there's a fee sharing agreement presumably between the Reese firm and the Pearson firm, and perhaps between the Reese firm and Mr. Lee.

Again, I apologize. I'm a broken record. That's discoverable under *In Re Agent Orange*. It's relevant to determining a conflict.

THE COURT: Okay. Pause. Pause. In those cases isn't it the case that actually both law firms or both counsel are still in the case?

Mr. Ramirez, maybe you can explain to me what the issue is.

MR. RAMIREZ: I'm not sure what the issue is frankly. Your Honor, what I can tell you is what the law is in the state. If we're going to work with someone else in any

capacity, we cannot do so until we disclose that to our client and get their agreement in writing. And because Mr. Lee, we foresee him consulting with us, assisting with us, and at some point down the road if there's a settlement or a win after trial and there's a recovery, we might share fees with him, then that is a reason why he is disclosed. There's nothing nefarious, and frankly, it's the law.

THE COURT: Mr. Donovan is saying that a fee sharing agreement hasn't been disclosed, but you just disclosed that there exist a fee sharing agreement.

MR. RAMIREZ: He quoted the fact that Mr. Lee was listed in the retainer agreement for Ms. Townes. I'm answering that question. And that is routinely what we do. What we do routinely is, our bar, believe it or not, works on a hand shake, word of mouth.

We routinely cut a deal with another attorney that's going to work on it. We put it in the letter, and at the end of the day, we end up honoring our deal. There's never an issue made of it. We practice all over the country, like I said, for decades.

And til this day I never had this issue come up ever where defendants cared about what we're doing with other people that may or may not be working on the case. So if there were anyone listed on the agreement other than my firm, would then defendants have the right to discover whether or not there is

another person working on the case that might get a fee? Frankly, I think it's a fishing expedition. At the end of the day, whether or not we're sharing fees with anyone, it's up to the judiciary to censor us or disbar us for violating the ethical rules and not for the defendants to enforce.

THE COURT: Again, I go back to, what is it that -- why is this dispute even right? What is the case of controversy?

MR. DONOVAN: Your Honor, since we're talking about things that someone never experience, I never experienced a retainer agreement or seen a retainer agreement where a claim is being assigned to the lawyer.

In this case, the retainer agreement assigned the counsel fee claim at paragraph 6 to the law firm, so they own the claim, purportedly, that's what it says.

MR. RAMIREZ: Your Honor, I could speak to that.

MR. DONOVAN: Paragraph 6 of the retainer agreement it says --

THE COURT: Is this in 173-3 anywhere?

MR. DONOVAN: It's in 173, Exhibit 1. It's in both of them, paragraph 6, attorneys fees. Page 3 of 6, your Honor.

MR. VISCONI: 173 1.

THE COURT: Let me try to pull it up, 173-1.

MR. DONOVAN: Page 3 of 6, your Honor.

MR. RAMIREZ: Your Honor, I could speak to that

whenever the Court would like.

THE COURT: Okay. I'm on it.

MR. RAMIREZ: May I?

THE COURT: Go ahead.

MR. RAMIREZ: Your Honor, as of late -- actually, not as of late, when the Trump era tax cuts came into play, there was an exemption in the code that exempted fees earned by attorneys in contingent cases from the income of the client.

When the new code came into place, that went away. So the problem that we've been having lately and why we've sort of tuned our retainer agreement and have put in this assignment clause is because what's been happening lately is, certain defendants are taking a 1099 that they would typically give to the client or the selling party for, let's say 25,000, and they're adding to that our fees; which are, let's say, $250, 000, so this plaintiff now is walking away with a $300,000 liability. It gets better, because we also have to pay taxes on that.

It's been a big issue. There's a bill right now in the Senate kicking around. I doubt it will ever come into law because of the bank-up. So after talking to tax attorneys, talking to other individuals in the plaintiffs' bar, we did a few things. So that's what that assignment does, it tries to take out the liability for our fees from the plaintiff.

It's not done for any other reason, for any nefarious

reason, and so hopefully that clarifies the issue.

THE COURT: You all are instructed to meet and confer on this issue too, and if necessary, you're going to brief it. My leaning right now is that this is premature. We don't need to get into this issue or demand production of any of the underlying agreements at this time.

But if it comes to briefing and you intend to brief it, I will apportion cost under 37(a)(5). In other words, this is one of those cases where I expect you to meet and confer and figure out a way through this. The incentive or disincentive is that the loser on the motion is going to pay, is going to pay for that motion. So think long and hard whether you want to make that motion or want to oppose that motion, or maybe there's some way that you can work it out that doesn't involve that risk.

If this fees issue is something that cannot be tabled at least until a motion for class cert, I need to know about it and would like to see a proposed briefing schedule on that issue by the time you're putting in your joint agenda for the next status conference.

MR. VISCONI: Your Honor, may I ask a question?

THE COURT: Sure.

MR. VISCONI: Discovery is now bifurcated in this case. If this does became an issue later in the case in terms of at the time of class certification, we will have an

opportunity to then receive the documents, and if there are applicable follow-up questions?

THE COURT: I'm not suggesting that documents should indeed be produced, because what I'm hearing from Mr. Ramirez right now is that they're not intending to produce anything further.

Now through your meet and confer process, you may agree on something interim that I do not have to bless if you both agree. But, if we get to a point and to me the next logical juncture may be -- but I'm not suggesting that you make it so if it doesn't need to be so -- the next juncture might be, for example, at a point, at class cert where you are suggesting that Mr. Ramirez and his firm are not adequate counsel or you're trying to raise some sort of a conflict issue.

When that becomes ripe, if and when that becomes ripe, then you may need to brief it. Right now I'm not seeing why this is an issue that needs to be addressed right now on the record that it is. I think this is something, again, that ought to be resolved between counsel. If it does not, I think you know where we're going to go with that.

Do we have other issues that we need to address today or should we set a date for our next conference?

MR. DONOVAN: Judge, I do think there's the other request that are unrelated to the fees that relate -- request

24 to the plaintiffs seeking communications which amount to how they were first notified about the existence of this lawsuit, if there are any.

THE COURT: I thought we dealt with request 24 at the last conference.

MR. DONOVAN: I don't believe we did, Judge. I think we just addressed 24 on my side, not their side.

THE COURT: There's another request, defendant's request 24?

MR. DONOVAN: Correct, your Honor.

THE COURT: Where does this show up on the agenda or on the status letter?

MR. DONOVAN: It's in our premotion conference letter.

THE COURT: Why couldn't it be in 175?

MR. DONOVAN: It is. It's attached as Exhibit A, your Honor.

THE COURT: I know, but why couldn't it have been in the body of 175 so we have it all in one place. This was what was originally filed as 170, and then is Exhibit A in 175?

MR. DONOVAN: Correct, Judge. On page 2 at the bottom.

THE COURT: Is this ripe after a meet and confer?

MR. DONOVAN: Yes, your Honor.

THE COURT: Mr. Ramirez.

MR. RAMIREZ: Yes, Judge. I'll start with the fact

that it's not relevant, but I'll also add that from a practical standpoint, your Honor -- and I go through this every week when I go to file a new case -- I literally get thousands of people that answer the ads we put out.

And if I retain one person on day one and I talk to 500 other people the next few weeks, which I typically do at times, and each of these people tells me, no, they don't want to do it. Yes, they want to do it. One can argue that I'm acting on behalf of the person I signed up on day one. And now somehow the things that I've done, which are completely irrelevant to my plaintiffs or clients' advocacy, now are subject to discovery.

Again, it's not relevant. But from a practical standpoint, it would seem burdensome, a waste of time, of resources. Because at the end of the day, whether I get one or fifty plaintiffs to represent the class, it doesn't matter. We only need one.

THE COURT: Yes. I mean, I'm not sure where the relevance is here.

MR. DONOVAN: Judge, at page 3, first full paragraph, we explain why the communication to plaintiffs Townes and Brown about this case, the first time they found out about it would be relevant. In their answers they say they learned about it in December of 2020, and those initial communications would be probative.

I'm not required or a party is not required to accept an answer to an arbitrary as true. I'd like to see the documents probative of how they became aware of the lawsuit. And with regard to others, the fact of the matter is *Auscape*, as we cite, sets forth that that's a discoverable level of information to the extent to show whether an agreed class exist.

Your Honor, plaintiffs Townes and Brown were joined in this lawsuit after a motion was filed, and the context of that motion was that first plaintiff had expressed reluctance to be in this case. And in deposition, that plaintiff said that he formed that belief -- time of his deposition was January 26, he said a few weeks before.

THE COURT: Is this Mr. Ashour?

MR. DONOVAN: Correct, your Honor. If the timing issue of how these folks found out about the lawsuit, whether they found out -- I don't know when they found out about it initially. Maybe they made a purchase after it. That's relevant to the timeline of whether they were received in connection with purchases. It goes to the timeline of their alleged awareness of being deceived.

THE COURT: Well, why can't you get that from a deposition?

MR. RAMIREZ: We disclosed that already, respectfully, your Honor.

THE COURT: I don't know how this is proportional.

MR. DONOVAN: Judge, to the extent that there are documents showing when they first became aware of the lawsuit -- otherwise, I'm just -- yes, I understand I can get it at a deposition, but I have to accept their testimony as true. What if there's a document that contradicts that testimony?

MR. RAMIREZ: Your Honor, we've been accused of this for months now. Defendants continue to say that they need to prove that our clients aren't lying. They signed a -- Mr. Ashour gave testimony under oath the same way that Townes and Brown will, and you can't go out there to prove something that you have no basis has happened.

We disclosed when they found out. We disclosed how. They answered an ad that we put out on a top class action website. One person learned about that from her mother. We disclosed all of that. You have to accept their word on this and you could confirm it at a deposition. We don't have to go now on a wild goose hut to find something that might impeach this person's credibility.

THE COURT: Mr. Donovan, do you want to brief this under the same loser pays rule?

MR. DONOVAN: Judge, I understand that you're going to direct that. Can I also say for the record, they refer to a top class action website. Can I get a copy of that website?

If that's where they say they learned about the lawsuit, I will accept that since they're referring to it, and then we won't have to worry about it.

MR. RAMIREZ: It's a quick Google search. I will send you the URL after this hearing.

THE COURT: Yes, please send the URL to Mr. Donovan. I don't need it. Okay. Will that be sufficient, Mr. Donovan?

MR. DONOVAN: Yes, your Honor.

THE COURT: Okay. You are entitled to make your motion, but take a look at 37(a)(5) before you do. Okay. All right. What else?

MR. DONOVAN: The other deals with Section B on page 3 of the letter, deals with two basic issues, Judge, about plaintiff Ashour. He received a retainer agreement that's dated January 9, 2019. This deals also with the timeline, Judge.

THE COURT: Didn't we deal with this last conference?

MR. RAMIREZ: Yes, Judge.

MR. DONOVAN: No.

THE COURT: I have that the complaint wasn't filed until five or six months later after -- the testimony was whether or when or how he was exposed to citric acid and whether he had that experience as a bartender. And I think my ruling at the time was -- and unfortunately since we didn't have a recording and the transcript -- my ruling at the time

was that you're not going to get any information on a prior employment dispute or employer info. I think what I had ordered was that --

MR. RAMIREZ: You provide the name of the employer.

THE COURT: -- provide the name of the employer when Mr. Ashour was working as a bartender. How is that not a motion for reconsideration?

MR. DONOVAN: Judge, this doesn't deal with his employer.

THE COURT: Let's first say, the information that was directed at the last conference, was that provided?

MR. DONOVAN: No, your Honor.

MR. RAMIREZ: Your Honor, the employer's name was given to Mr. Donovan at Mr. Ashour's deposition, so he does have that already.

And, your Honor, you did rule on this, and you denied that motion, but you ordered us to provide the employer's name, which Mr. Ashour had already given to the defendants at his deposition.

MR. DONOVAN: Judge, he identified employers in his deposition, but there hasn't been identification of this employer is the one that he was exposed to --

THE COURT: Do you really want me to get the deposition and take a look at it and see if the name of the employer, this particular employer, can be discerned from the

deposition? Because if it does, I will sanction you, or you could work it out yourselves.

MR. DONOVAN: Judge, I apologize. I did not realize that was the case. All I'm saying is that this application doesn't deal with the employers.

THE COURT: Okay. I am just trying to make sure we're not going over old ground?

MR. DONOVAN: I don't believe we are, your Honor.

THE COURT: Why was this not resolved at the last conference? What is the open issue now?

MR. DONOVAN: Judge, my recollection is it wasn't resolved at the last conference because I addressed the Court and said that there were some other issues that I felt was necessary to write a letter to your Honor requesting a conference. That's my recollection of what transpired.

This issue deals with when the plaintiff received the retainer agreement. I asked him when he received it. He said he didn't know, and he said he deleted his emails. The request is for records sufficient to show when he received the email or deleted it, and the same is true with regard to the draft complaint that's referred to in the retainer agreement.

Again, this goes to marking down a date, Judge. The retainer agreement indicates that he received the draft complaint before receiving the retainer agreement. I have since received communication from counsel saying that either

the retainer agreement or what not was mistaken. Be that as it may, the letter indicates the complaint that was sent and the retainer that was sent. I'm only seeking to find out the dates they were sent and sent back. That marks a date that the plaintiff believes he was deceived.

MR. RAMIREZ: Your Honor, the plaintiff testified at his deposition that he was deceived for many years before he reached out to my partner Michael Reese. It's testimony given under oath.

MR. DONOVAN: Your Honor, his testimony, my recollection is, that in late 2018 which he later described was late November or late December, he went on a website, and around that time had a communication with Mr. Reese.

January 9 is the date of the retainer agreement which presumably was sent before that. The retainer agreement refers to a draft complaint being previously sent to the retainer agreement. All I'm looking for is the chronology of when it was received and/or deleted. He said he deleted those emails.

THE COURT: Why does it matter?

MR. DONOVAN: Because, for instance, Judge, if he received a draft complaint in July of 2018 and made a purchase after that day, that would be indicative that he wasn't deceived in connection with the particular purchase and would be indicative of lack of adequacy.

MR. RAMIREZ: Again, without any proof, he is calling

the client, our plaintiff a liar. He testified under oath that he was buying this stuff for years before he turned around and looked at the label one day and said, oh, there's citric acid here, which I know is a preservative because of my job as a bartender. I'm not sure what the timing of the complaint versus when he got the letter versus when the complaint was finally filed, the chronology of any of that stuff, I don't think it's going to help anyone either prove the case or defend against it. In fact, I don't think, I know it's not going to.

THE COURT: Mr. Donovan, how do you want to proceed?

MR. DONOVAN: I guess we'll meet and confer again, your Honor.

THE COURT: Yep. And if you think that there needs to be a motion made, work on a briefing schedule. Keep 37(a)(5) in mind. If you're going to refer to Mr. Ashour's deposition, I expect the entire deposition to be attached.

If I find that this motion was not made in good faith or made for good faith basis or seeks information that would be duplicative and the like, again, refer to 37(a)(5).

MR. DONOVAN: Understood, your Honor.

THE COURT: All right. Other issues?

MR. RAMIREZ: Your Honor, just the issue of the motion to dismiss as it relates to understanding the full scope of the discovery that we'll need to request, gather, review.

THE COURT: The motion to dismiss is not before me,

right?

MR. RAMIREZ: Right. I believe it's before Judge Torres.

THE COURT: So what's the question?

MR. RAMIREZ: Your Honor, just to the extent that we would probably need closure on that to understand the full scope of the discovery that we'll be needing to get. We're still aways away. And that's it. I have nothing else to say, Judge.

THE COURT: Let me just take a look at my notes here. Do we need to pushout? We do need to pushout the fact discovery end date, right, because right now it's the end of the December?

Again, I think because the motion is pending before the district judge, let's set another date for discovery status conference. I am looking at early February because that will give you hopefully a month of work from now, and assuming that we're not going to get a whole lot done in the next two weeks. There's potentially some humor in scheduling you for Groundhog Day. You keep coming up with the same issues maybe I won't choose that date. How about February 1st?

MR. RAMIREZ: February 1st at three, Judge?

THE COURT: How about 3:30? Just a minute. Let's do 3:30 on February 1st. Anything else to address at this time?

MR. RAMIREZ: No, your Honor.

MR. DONOVAN: No, your Honor. Thank you.

THE COURT: And I look forward to see your joint status letter. I do need to extend discovery. I'm going to extend discovery until, let's say -- February 28, 2022 is the new discovery end date, assuming that it will probably still need to get pushed given how other things are moving in the case. All right.

Have a safe and happy and healthy holiday season. I look forward to seeing you again in February, and I hope you at least enjoy the holidays and you're not only just thinking about the case. I'm going to ask the parties to order a copy of the transcript since we will have one this time and share the cost. Thank you.

(Adjourned)